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SUPREME COURT, U.S.

No. 76-709

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

EARL L. BUTZ, ET AL., Petitioners,

v.

ARTHUR N. ECONOMOU, ET AL., Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

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PRELIMINARY STATEMENT

This memorandum is submitted pursuant to this Court's direction. The petitioners have submitted a memorandum, a draft of which was received by respondents today, and respondents requested of the Chief Clerk an opportunity to submit their own memorandum and were informed they could do so and that a typewritten copy would be acceptable.

I. THE DISTRICT COURT HAD JURISDICTION OVER THIS MATTER UNDER 28 U.S.C. § 1331.

Plaintiffs, in their complaint, paragraphs "1", "13", "14", "15", "18", "19" and "20", alleged that they were deprived of their First and Fifth Amendment Constitutional rights. Clearly such an allegation is within the ambit of 28 U.S.C. § 1331, which confers original jurisdiction on the district court "wherein the matter in controversy. . .arises under the Constitution. . .of the United States. . . ."

In the landmark case of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), this Court held that 28 U.S.C. § 1331 embraces civil damage actions brought as a result of the deprivation of a Constitutional right. The Court in Bivens was presented with a Fourth Amendment violation, but there is no language in the opinion which limits the Court's holding to Fourth Amendment cases.

Rather, the language of the opinion is broad enough to encompass all Constitutional rights:

> "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interest in liberty. See, Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536, 540 (1927); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900); J. Landynski, Search and Seizure and the Supreme Court 28 et seq. (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 et seq. (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 8-33 (1968); cf. West v. Cabell, 153 U.S. 78 (1894); Lammon v. Feusier, 111 U.S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is. . .well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 U.S., at 684 (footnote omitted)." Bivens, supra, at 395-396.

Moreover, Mr. Justice Harlan's characterization of the issue presented in Bivens as addressing the "power [of federal courts] to award damages for violation of 'constitutionally protected interests'" such as the Fourth Amendment is further support for a broad reading of Bivens. Id. at 399 (Harlan, J. concurring in the judgment). Mr. Justice Harlan went on to state:

> "The judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Missouri, Kansas & Texas R. Co. v. May, 194 U.S. 267, 270 (1904). But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes." Id. at 407 (Harlan, J., concurring in the judgment). (emphasis supplied).

The overwhelming majority of the lower courts to consider the question have held that Bivens is not so restricted.[1]

1/ See, Dellums v. Powell, C.A.D.C. No. 75-1974, decided August 4, 1977 (First Amendment); Davis v. Passman, 544 F.2d 865, 873 (5th Cir. 1977) (Fifth Amendment); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (Thirteenth and Fourteenth Amendments); Brault v. Town of Milton, 527 F.2d 730, at 732 (2d Cir. 1975) (Fourteenth Amendment), rev'd on other grounds, 736 F.2d 527 (2d Cir. 1975) (en banc); Paton v. La Prade, 524 F.2d 863 (3d Cir. 1975) (First Amendment); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975) (First Amendment); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 932 and n.5 (10th Cir. 1975) (Fifth Amendment); States Marine Lines Inc. v. Shultz, 498 F.2d 1146, 1156-1157 (4th Cir. 1974) (Fifth Amendment); Sullivan v. Murphy, 156 U.S. App.D.C. 28, 478 F.2d 938, 965 and n.47 (1973) (Fourth and Fifth Amendments), cert. denied, 414 U.S. 880, 84 S.Ct. 162, 28 L.Ed.2d 125; Braden v. University of Pittsburgh, 477 F.2d 1, 7 n.10 (3d Cr. 1973) (Fourteenth Amendment, dictum); United States ex rel. Moore v. Koelzer, 457 F.2d 1163, 1164-1165 (3d Cir. 1971), cert. denied, 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (Fourth and Fifth Amendments); Panzarella v. Boyle, 406 F.Supp. 787 (D.R.I. 1975) (Fourteenth Amendment); Revis v. Laird, 391 F.Supp. 1133, 1139 (E.D.Cal. 1975) (First and Fifth Amendments); Patterson v. City of Chester, 389 F.Supp. 1093, 1096 (E.D.Pa. 1975) (First and Fourteenth Amendments); Brown v. Board of Education of City of Chicago, 386 F.Supp. 110, 121-122 and n.5 (N.D.Ill. 1974) (Fourteenth Amendment); Shaffer v. Wilson, 383 F.Supp. 554 (D.Colo. 1974) (Fourth and Fifth Amendments); Gardels v. Murphy, 377 F.Supp. 1389, 1398 (N.D. Ill. 1974) (First Amendment); Dahl v. City of Palo Alto, 372 F.Supp. 647 (N.D. Cal. 1974) (Fifth Amendment); Perzanowski v. Salvio, 369 F.Supp. 223, 229 (D.Conn. 1974) (Fourteenth Amendment); Butler v. United States, 365 F.Supp. 1035 (D.Haw. 1973) (First, Fourth and Fifth Amendments); Dupree v. City of Chattanooga, 362 F.Supp. 1136, 1139 (E.D.Tenn. 1973 1973) (Fourteenth Amendment); James v. United States, 358 F.Supp. 1381, 1386 (D.R.I. 1973), vacated, 502 F.2d 1159 (1st Cir. 1974) (Fourth, Fifth and Eighth Amendments, dicta); Washington v. Brantley, 352 F.Supp. 559, 564 (M.D.Fla. 1972) (Fourteenth Amendment and assumes arguendo that Bivens recognizes a cause of action for violation of all constitutionally protected interests, dicta); Johnson v. Alldredge, 349 F.Supp. 1230, 1231 (M.D.Pa. 1972) aff'd in part and rev'd in part on other grounds, 488 F.2d 820 (3d Cir. 1973) (Fifth Amendment); Howard v. Warden, Petersburg Reformatory, 348 F.Supp. 1204 (F.D.Va. 1972) (First and Ninth Amendments). See generally Dellinger, "Of Rights and Remedies: The Constitution as a Sword," 85 Harv.L.Rev. 1532, 1542-1543 (1972). Cf. Lipman v. Commonwealth of Massachusetts, 475 F.2d 565, 568 n.7 (1st Cir. 1973) (Fourteenth Amendment, dictum--no

As can be seen, every Circuit Court to pass on this question has given Bivens a broad reading, and that includes the Second, Third, Fourth, Fifth, Sixth, Tenth and District of Columbia Circuits (See cases cited n. 1, supra). The Second Circuit, the circuit in which this case was originally brought, has held that a cause of action exists for violations of the Fourteenth Amendment. Brault v. Town of Milton, 527 F.2d at 732.

Moreover, of the four decisions giving Bivens a limited reading, two of the opinions are authored by the same judge and his sole reason for declining to so interpret Bivens is that ". . .the Court is aware of no cases which have so held. . . ." Archuleto v. Callaway, 385 F.Supp. at 388 (per Matsch, D.J.). See also, Moore v. Schlesinger, 384 F.Supp. at 165 (per Matsch, D.J.).

The court in Smothers v. Columbia Broadcasting System, supra, also states as its reason for limiting Bivens that ". . .no court has ever sustained a case awarding damages based on a violation of the First Amendment. . . .This Court is not going to be the first to do so." 351 F.Supp. at 625-626.

Finally, in Davidson v. Kane, supra, which appears to be the first case to consider the scope of Bivens, the court, without presenting any analysis at all, stated that: "The holding [in Bivens] appears to be limited to the Fourth Amendment." 337 F.Supp. at 924.

In marked contrast to these cases which provide virtually no insight into the basis of their conclusion that Bivens applies solely to the Fourth Amendment, are the cases holding that it is not so restricted (See cases cited n. 1, supra.) These latter cases present persuasive and cogent analysis in support of the position that Bivens is not limited to Fourth Amendment cases.

(footnote 1 continued--)

direct reference to Bivens). But see, Archuleta v. Callaway, 385 F.Supp. 384, 388 (D.Colo. 1974); Moore v. Schlesinger, 384 F.Supp. 163 (D.Colo. 1974); Smothers v. Columbia Broadcasting System, 351 F.Supp. 622, 626 n.4 (C.D.Cal. 1972, dictum); Davidson v. Kane, 337 F.Supp. 922 (E.D. Va. 1972).

For example, in Dellums v. Powell, supra, the court, in holding that a cause of action exists for redress of First Amendment violations, went through the following analysis pertinent to the case at bar:

> "In Bivens Mr. Justice Harlan, concurring specially, indicated that 'courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.' Yet he opined that '[t]he same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted.' It is apparently this language that has given courts pause in analyzing whether a right of action should be implied directly from the Constitution for redress of violations of interests protected by other than the Fourth Amendment. Given the intangible nature of the liberty interests at stake in many Fourth Amendment cases and the broad familiarity of federal courts with equitable relief for First Amendment violations, it is difficult to identify here the impediments feared by Mr. Justice Harlan. Indeed, the Supreme Court has recently approved in principle the award of reinstatement and back pay relief for violation of First and Fourteenth Amendment rights of a non-tenured schoolteacher. [Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 45 U.S. L.Week 4079, 4081-4083 (Jan. 11, 1977)] The unanimous Court dealt explicitly with the problem of causation and apparently found no difficulty in prescribing the elements of a cause of action and defenses thereto." C.A.D.C. No. 75-1974 at pp. 49-50. (footnotes omitted).

And, in Paton v. La Prade, supra, the court, again in holding that a cause of action exists for redress of First Amendment violations, stated that:

> "First amendment rights must be as personal to an individual as are fourth amendment rights. And '[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests.' Bivens, supra, 403 U.S. at 395, 91 S.Ct. at 2004. . . .
>
> "Were there no cause of action for federal infringement of first amendment rights, an aggrieved individual could seek damages for violations of his first amendment rights by state officials, 42 U.S.C. § 1983, but not by federal officials. There is no reason to allow federal officials to act with impunity in this context and to bar state officials. The damage to the individual's first amendment interests is the same regardless of the perpetrator of the violation.
>
> "Thus, we believe the extension of the Bivens rule to violations of first amendment rights to be both justifiable and logical." 524 F.2d at 870-871.

In a case dealing with Fifth Amendment rights, States Marine Lines, Inc. v. Shultz, supra, the court, in holding that a cause of action existed, used language squarely applicable in the instant case:

> "With one possible exception, nothing said in Bivens would limit the application of the principles enunciated therein to the case at bar. The single exception could be the court's statement that '[h]istorically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.' 403 U.S. at 388. But subsequent to its decision in Bivens, the court has rejected, albeit in a different context, the artificial distinction between personal and property rights. Lynch v. Household Finance Corporation, 405 U.S. 538, at 552, 92 S.Ct. 113, 31 L.Ed.2d 424 (1972).[2] In Lynch the court allowed suit in federal court under 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), for the alleged deprivation of property pursuant to state law in violation of the equal protection and due process clauses of the Fourteenth Amendment. To permit a party to sue for the alleged deprivation of his property without due process of law by persons acting under color of state law and not permit a suit for damages against a federal officer for identical acts in violation of the identical provision in the Fifth Amendment can only be justified, if at all, by the fact that Congress specifically recognized the potential liability of state officers for their allegedly unconstitutional acts in 42 U.S.C. § 1983. But, in light of the court's decision in Bivens, the fact that Congress has not specifically recognized a cause of action for damages against federal officers is no longer an obstacle preventing federal courts from fashioning a damage remedy, where appropriate, directly from the Constitution. . . .The necessity and appropriateness of judicial relief is no less compelling in this case than it was in Bivens.

2/ In Lynch the court stated:

"Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." at 552.

As in Bivens: A common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authority; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of mandamus are no longer viable alternatives." 498 F.2d at 1155-1156 (footnote supplied).

In Davis v. Passman, supra, the Court also used language appropriate to the instant case:

> "Although Davis's claim arises under the fifth amendment, not the fourth, we find no basis in Bivens' language or rationale for according any significance to this distinction. The rights protected by the fifth amendment due process clause are every bit as fundamental as fourth amendment rights. Here, as in Bivens, damages simply constitute 'a particular remedial mechanism normally available in the federal courts." 403 U.S. at 397, 91 S.Ct. at 2005." 544 F.2d at 873.

In addition, this Court, in a case claiming a violation of the Fourth Amendment, held that on the face of the complaint the federal court had jurisdiction because

> ". . .the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction." Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963), quoting Bell v. Hood, 327 U.S. 678, 685 (1946).

That this reasoning applies to the instant case is clear and therefore the district court had jurisdiction over this case.

The case of Jacobs v. United States, 290 U.S. 13 (1933), is worthy of mention. There the Supreme Court was faced with the question of whether claimants, in a suit under the Tucker Act, were entitled to interest on their damage award. In holding that the interest must be paid, the court stated:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. The right

> was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States." at p. 16. (emphasis supplied).

In addition to the violations of respondents' First and Fifth Amendment rights by petitioners, respondents also allege, in paragraph 19 of their complaint, that petitioners violated Section 9(a) of the Administrative Procedure Act, 5 U.S.C. 558(b), which provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." This allegation is also within the ambit of 28 U.S.C. § 1331, which confers original jurisdiction on the district court ". . .wherein the matter in controversy. . . arises under the. . .laws. . .of the United States. . . ."

Finally, in Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980 (1977), this Court, in holding that the Administrative Procedure Act "does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action," 97 S.Ct. at 985, also stated that "[t]he obvious effect of" eliminating the amount in controversy requirement for actions brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity "is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate." 97 S.Ct. at 984. In the case at bar, the District Court is in part asked to review allegedly wrongful acts of

a federal agency and its employees and determine the consequences of those wrongful acts.

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November 21, 1977

Respectfully submitted,

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